REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2334 OF 2008

IN THE MATTER OF THE ESTATE OF LABAN MUGWONGA MIONDU alias LABAN MIGUONGO MIONDU (DECEASED)

KEZIAH WAMBUI MBUGUA.....1ST APPLICANT

LUCY KISA WANJIRA……..…….2ND APPLICANT

VERSUS

PETER KABUGO MIGUONGO..…….....……..RESPONDENT

RULING

1. The deceased Laban Mugwonga Miondu alias Laban Miguongo Miondu died intestate on 8th April 1978. He left the following survivors:-

(a) Damaris Wanjiru Miguongo (widow);

(b) Dorcas Njeri (daughter/deceased);

(c) Lucy Kisa Wanjira (daughter);

(d) Kezia Wambui (daughter);

(e) Samuel Mionda (son/deceased but survived by his widow Mary Njeri Miondu); and

(f) Peter Kabugo Miguongo (son).

The family consented to Peter Kabugo Miguongo (the respondent) to petition for the grant of letters of administration instate. The petition was filed on 8th October 2008, and grant issued on 26th March 2012.

2. On 28th January 2014 the respondent applied for the confirmation of the grant. There was no dispute that the only property comprising the estate was Dagoretti/Uthiru/53 which was said to be about 4.2 acres according to a search dated 15th December 2011. In paragraph 6 of the affidavit that the respondent swore to support the application he allocated 0.65 Ha to himself, 0.65Ha to Mary Njeri Miondu, 0.075Ha

to Kezia Wambui Mbugua (1st applicant) and 0.075Ha to Lucy Kisa Wanjira (2nd applicant). He filed a consent to the confirmation of the grant. The applicants and Mary Njeri Miondu had each signed the consent before an advocate. The application came for hearing on 6th February 2014. The respondent was present as were the 2nd applicant and Mary Njeri Miondu. The grant was confirmed on the basis of the consent. Mary Njeri Miondu informed the court that she had children in which case it was ordered that she holds the 0.65Ha in trust for the children: Damaris Wanjiru, Eunice Wamaitha, Dorcas Njeri and Laban Miguongo.

3. On 16th December 2014 the applicants applied under **section 76** of the **Law of Succession Act (Cap 160)** and **rule 44(1)** of the **Probate and Administration Rules** to have the grant revoked on the grounds that:-

(a) the grant had not provided for equal shares to the beneficiaries;

(b) the respondent's division of the shares to the beneficiaries did not "add up to the actual size of the deceased's estate – Land Parcel No. Dagoretti/Uthiru/53";

(c) the respondent did not involve the applicants in the proceedings.

The applicants swore an affidavit to support the application. They complained that although the deceased's parcel measured 4.2 acres the shares given to the beneficiaries added to 3.583028 acres, and asked where the balance (of 0.6 acres) would go to. They stated that they had not been involved in the proceedings leading to the confirmation, and that since grant the respondent had failed to call a meeting, and had instead operated secretly. The respondent filed a replying affidavit to say that the applicants were all the time privy to the proceedings, and that on 21st December 2011 there had been a family meeting at which the sharing had been agreed upon. It was on that basis that the application for confirmation was filed. It had the consent to the distribution. On the issue of the acreage of the deceased's parcel, the respondent swore as follows:-

> **"THAT paragraph 8 of the applicant's affidavit is not denied and the issues of the actual measurements on the ground has on several occasions been discussed and particularly in a family meeting held on 21st December 2011 when both the applicants were present and we all agreed that we contribute money and engage the services of a surveyor who would give out the actual measurements of each portion as demarcated by our father but not one has so far brought her contribution todate."**

4. In the further affidavit the respondent stated that all the beneficiaries, including the applicants, had signed all the necessary papers leading to the grant and had filed a consent to support the confirmation.

5. The applicants were represented by Irungu Mwangi, Ng'ang'a T.T. & Co. Advocates and the respondent by D.N. Kamau & Co. Advocates. Each side filed written submissions. I have considered the submissions.

6. I have carefully considered the record. It is clear that on 8th October 2008 the applicants consented to the respondent to petition for the grant of letters of administration intestate. Secondly, on 28th January 2014 the applicants filed a consent to the mode of sharing contained in the application for the confirmation of the grant. This is the sharing that the court adopted when it allowed the application on 6th February 2014. It is accepted that the 1st applicant did not attend the hearing on that date, although the respondent states that she had been notified to attend. The record does not show any service, but she had consented to the sharing. Further, the respondent provided minutes of the family meeting ("PKM – 7"), and they show that on 21st December 2011 the applicants were present and agreed to the sharing. The 2nd applicant was in court on 6th February 2014 and raised no objection. She had signed the consent filed in court and had agreed to the sharing at the family meeting. In short, the applicants cannot be allowed to resile from the agreement they entered into on the mode of distribution which finally found itself in the

certificate of confirmation. It is trite that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material facts by legally competent persons **(Flora N. Wasike –v- Destimo Kwamboka [1981]KLR 429).** The confirmation followed a consent entered into by the family.

7. From the family meetings minutes, it is clear that it was agreed that a survey would be done to confirm the sizes of the shares. The expenses were to be borne equally. That has not been done. I make order that, if the joint survey reveals that there is a balance of land (after the shares in the certificate of confirmation have been considered) that balance shall be shared equally among all the beneficiaries. Otherwise, the application by the applicants has no merits and is hereby dismissed with costs.

DATED and SIGNED at NAIROBI this 22nd day of MARCH 2017.

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 29TH day of MARCH 2017.

R.E. OUGO

JUDGE